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Starfish Holdings Sdn Bhd v Hong Leong Bank Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04(NCC)(W)-498–10 OF 2022
RAVINTHRAN, MARIANA YAHYA AND LIM CHONG FONG JJCA
1 APRIL 2024

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Banking — Banker and customer — Forged cheques — Company entrusted its accounts clerk ('AC') to have custody of its cheque books although she was not authorised signatory of its current account with bank — Bank paid out on forged cheques presented by AC — Whether bank was liable to compensate company for loss under s 24 Bills of Exchange Act 1949 ('BEA') — Whether company had knowingly or negligently allowed AC to commit the fraud/forgery by entrusting her with the cheque books — Whether s 73A of BEA absolved bank of liability — Whether company breached contractual duty to bank by failing to promptly check bank's monthly statements for anomalies — Whether no evidence bank had acted dishonestly — Whether bank was thus deemed to have acted in good faith under s 95 of BEA

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The instant appeal was against the High Court's reversal of the session's court's decision to allow the appellant's claim against the respondents. The appellant had maintained a current account with the first respondent bank ('HLBB') and had allowed its then accounts clerk — the second respondent ('R2') — to have custody of its cheque books although she was not the appellant's sole authorised signatory for the account. The appellant filed the sessions court suit after discovering that without its knowledge or approval, R2 had presented to HLBB for its further action 37 of the appellant's cheques for a total sum of RM254,890. Only three of the cheques were crossed as 'A/C Payee'. The rest were cash cheques, for a total sum of RM248,700, which R2 encashed over the HLBB counter. R2 did not enter a defence to the appellant's suit or participate in the trial. In allowing HLBB's appeal against the trial court's decision allowing the appellant's claim, the High Court held that the trial judge fatally erred in not applying s 73A of the Bills of Exchange Act 1949 ('the BEA') to the facts of the case which would have absolved HLBB of liability since the appellant had knowingly or negligently created the opportunity or means for R2 to commit the fraud by allowing her to have possession of the cheque books. The High Court also held that the appellant had breached its contractual duty to HLBB in failing to promptly check the bank's monthly statements for anomalies and that since no evidence of dishonesty on HLBB's part was adduced at the trial, the bank was deemed to have acted in good faith pursuant to s 95 of the BEA.

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Held, dismissing the appeal:

(1) The relevant law was settled in that since the 1998 amendment by the insertion of s 73A which had to be read with s 95 of the BEA, the bank customer could not merely rely on s 24 of the BEA to seek recompense from the bank even if forgery was established. In view of the decided cases post 1998, it was clear that if there was evidence that the bank customer knowingly or negligently contributed to the forgery or making of the unauthorised signature, the bank customer could not claim against the bank pursuant to s 24 unless there was lack of good faith by the bank which constituted dishonesty. In the instant case, the High Court correctly found that the appellant had knowingly and negligently contributed to the forgery (see paras 21–22).

(2) The trial judge was plainly wrong in failing to judicially appreciate the evidence. The undisputed evidence of HLBB's police report that R2 had the cheque books in her possession and that they were entrusted to her by the appellant since the cheque books were kept in a steel cabinet drawer which at all material times remained untampered/unbroken were glaringly overlooked by the trial judge. Additionally, the trial judge merely found that the appellant had checked the monthly bank statements without considering that the appellant ought to have checked them against the cheque butts which would have revealed the fraud of R2 (see para 23).

(3) The High Court correctly found that HLBB had acted in good faith at all material times. The trial judge was plainly wrong to have found that HLBB had not acted in good faith because of its failure to comply with the standard operating procedures ('SOPs'). The trial judge overlooked the fact that the SOPs were only to check the specimen signature and call the customer for verification if the sum exceeded the threshold of RM30,000, which were both complied with by HLBB. The impugned cheques were all below the threshold amount. The trial judge failed to appreciate that lack of good faith necessarily connoted dishonesty on HLBB's part which had not been made out on the facts and circumstances whether by actual or circumstantial evidence. In actuality, the appellant was lackadaisical over a period of three years in failing to detect the missing funds encashed by R2 but there was no egregious negligence by HLBB (see paras 24–25).

[Bahasa Malaysia summary

Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi yang membatalkan/mengakas keputusan mahkamah sesyen bagi membenarkan tuntutan perayu terhadap responden. Perayu telah mengekalkan akaun semasa dengan bank responden pertama ('HLBB') dan telah membenarkan kerani akaunnya ketika itu — responden kedua ('R2') — untuk menjaga buku ceknya walaupun dia bukan satu-satunya penandatangan yang dibenarkan oleh perayu bagi akaun tersebut. Perayu memfailkan saman mahkamah sesyen

selepas mendapati tanpa pengetahuan atau kelulusannya, R2 telah mengemukakan kepada HLBB untuk tindakan selanjutnya 37 cek perayu dengan jumlah keseluruhan RM254,890. Hanya tiga daripada cek telah dipalang sebagai 'A/C Payee'. Selebihnya ialah cek tunai, dengan jumlah keseluruhan RM248,700, yang R2 tunaikan di kaunter HLBB. R2 tidak memasukkan sebarang pembelaan terhadap saman perayu atau mengambil bahagian dalam perbicaraan. Dalam membenarkan rayuan HLBB terhadap keputusan mahkamah perbicaraan yang membenarkan tuntutan perayu, Mahkamah Tinggi memutuskan bahawa hakim perbicaraan telah terkhilaf secara teruk dalam tidak menggunakan s 73A Akta Bil Pertukaran 1949 ('ABP') kepada fakta kes yang akan menyebabkan pelepasan HLBB terhadap liabiliti kerana perayu telah secara sedar atau cuai mencipta peluang atau cara untuk R2 melakukan penipuan dengan membenarkan dia memiliki buku cek. Mahkamah Tinggi juga memutuskan bahawa perayu telah melanggar kewajipan kontraknya terhadap HLBB kerana gagal menyemak penyata bulanan bank dengan segera atas sebarang anomali dan memandangkan tiada bukti ketidakjujuran di pihak HLBB yang telah dikemukakan semasa perbicaraan, bank itu dianggap telah bertindak dalam niat baik menurut s 95 ABP.

Diputuskan, menolak rayuan:

(1) Undang-undang yang berkaitan telah ditetapkan kerana sejak pindaan 1998 dengan memasukkan s 73A yang perlu dibaca dengan s 95 ABP, pelanggan bank tidak boleh hanya bergantung pada s 24 ABP untuk mendapatkan pampasan daripada bank walaupun pemalsuan dibuktikan. Dengan mengambil kira kes yang diputuskan selepas 1998, ia adalah jelas bahawa jika terdapat keterangan bahawa pelanggan bank secara sedar atau cuai menyumbang kepada pemalsuan atau membuat tandatangan tanpa kebenaran, pelanggan bank tidak boleh membuat tuntutan terhadap bank menurut s 24 melainkan sekirnya terdapat ketiadaan niat baik oleh bank yang terjumlah kepada ketidakjujuran. Dalam kes semasa, Mahkamah Tinggi telah dengan tepat mendapati perayu telah dengan sengaja dan cuai menyumbang kepada pemalsuan (lihat perenggan 21–22).

(2) Hakim perbicaraan jelas salah kerana gagal menilai secara kehakiman kesemua keterangan. Keterangan yang tidak dipertikaikan dalam laporan polis HLBB bahawa R2 mempunyai buku cek dalam milikannya dan bahawa ia telah diamanahkan kepadanya oleh perayu memandangkan buku cek itu disimpan dalam laci kabinet keluli yang pada setiap masa material kekal tidak diusik/tidak dipecahkan dengan jelas diabaikan oleh hakim perbicaraan. Selain itu, hakim perbicaraan hanya mendapati perayu telah menyemak penyata bank bulanan tanpa

mengambil kira bahawa perayu sepatutnya menyemaknya terhadap punggung cek yang mana akan mendedahkan penipuan R2 (lihat perenggan 23).

(3) Mahkamah Tinggi dengan betul mendapati bahawa HLBB telah bertindak dengan suci hati pada setiap masa material. Hakim perbicaraan jelas salah apabila mendapati HLBB tidak bertindak dengan niat baik kerana kegagalannya mematuhi prosedur operasi standard ('SOP'). Hakim perbicaraan terlepas pandang bahawa SOP hanya untuk menyemak tandatangan spesimen dan memanggil pelanggan untuk pengesahan jika jumlah itu melebihi ambang RM30,000, yang kedua-duanya telah dipatuhi oleh HLBB. Cek yang disangkal semuanya berada di bawah amaun ambang. Hakim perbicaraan gagal menilai bahawa ketiadaan niat baik semestinya bermaksud ketidakjujuran di pihak HLBB yang tidak dibuktikan berdasarkan fakta dan keadaan sama ada dengan keterangan sebenar atau mengikut keadaan. Sebenarnya, perayu kurang berhati-hati dalam tempoh tiga tahun kerana gagal mengesan kehilangan dana yang ditunaikan oleh R2 tetapi tiada kecuaian yang teruk oleh HLBB (lihat perenggan 24–25).]

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1, FC (refd)

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

CIMB Bank Bhd v Panaron Control Sdn Bhd [2014] MLJU 1924; [2015] 1 CLJ 1056, CA (refd)

Hong Leong Bank Bhd v Starfish Holdings Sdn Bhd & Anor [2022] MLJU 3172; [2023] 2 CLJ 464, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Lipkin Gorman (a firm) v Karpnale Ltd and another [1992] 4 All ER 331, QBD (refd)

Malaysia Plastics Sdn Bhd v United Overseas Bank (M) Bhd and another suit [2012] 9 MLJ 336, HC (refd)

Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577; [2010] 6 CLJ 857, FC (refd)

Prima Nova Sdn Bhd v Affin Bank Bhd [2014] MLJU 1926; [2014] 9 CLJ 442, CA (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 24, 73A, 95

Appeal from: *Hong Leong Bank Bhd v Starfish Holdings Sdn Bhd & Anor*

A [2022] MLJU 3172 (High Court, Kuala Lumpur)

Tan Ch'eng Leong (with Tan Jing Yi) (KP Lu & Tan) for the appellant.
Karen Lee Foong Voon (with Cheah Kha Mun) (Wong Kian Kheong) for the first respondent.
B *Unrepresented for the second respondent.*

Lim Chong Fong JCA:

INTRODUCTION

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[1] This is an after-trial appeal relating to forged and/or unauthorised cheques that were paid-out.

[2] The appellant/plaintiff is a private limited company which is the D customer of the first respondent/first defendant bank. The second respondent/second defendant is a former accounts clerk of the appellant.

[3] This appeal is against the decision of the High Court that reversed the decision of the sessions court which allowed the appellant's claim against both E the first and second respondents in the sessions court.

[4] We heard the appeal on 2 August 2023 and 30 October 2023. Upon conclusion of the appeal, we unanimously dismissed the appeal with costs of RM15,000 payable by the appellant to the Respondent subject to allocator. F

[5] Accordingly, we provide below the grounds of our decision.

BACKGROUND

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[6] The appellant opened and maintained a current account with the first respondent No 27700024925 ('Account') at its Desa Sri Hartamas bank branch for the purposes and in connection with the appellant's business.

H **[7]** The appellant's sole authorised signatory of the Account is a Miss Teh Chee Yen. Nevertheless, the appellant also employed the second respondent as its accounts clerk who handled the appellant's cheque books.

[8] Around 2 November 2017, the appellant discovered that there were 37 I cheques totaling to RM254,890 presented by the second respondent to the first respondent without the appellant's authority and knowledge ('unauthorised cheques').

[9] Amongst these unauthorised cheques which were cross-cheques (A/C

Payee only), there were 34 of them which were cash cheques en-cashed by the second respondent over the counter of the first respondent bank totaling to RM248,700.

[10] As the result, the appellant instituted Kuala Lumpur Sessions Court Suit No WA-A52NCC-2734–11 of 2019 ('Suit') on 6 November 2019 against both the First and second respondents.

IN THE SESSIONS COURT

[11] The trial of the Suit spanned over six days. However, the second respondent neither entered her defence nor participated in the trial.

[12] After conclusion of the trial, the learned sessions court judge found for the appellant and ordered the following ('decision'):

(i) satu pengisytiharan bahawa Defendan Pertama tidak berhak untuk mendebit/menolak (debit) Akaun Semasa Plaintif No. 27700024925 dalam jumlah RM254890.00 bersama dengan faedah-faedah yang terakru atasnya;

(ii) terhadap Defendan Pertama dan Kedua, secara bersesama dan berasingan, jumlah sebanyak RM254,809.00 ('jumlah penghakiman tersebut');

(iii) faedah atas jumlah penghakiman tersebut pada kadar 5% setahun daripada tarikh penghakiman sehingga tarikh penyelesaian penuh; dan

(iv) kos sebanyak RM10,000.00 kepada Plaintif.

[13] The first respondent is dissatisfied with the decision and on 28 February 2022 lodged its appeal in the High Court.

IN THE HIGH COURT

[14] The learned High Court judicial commissioner allowed the appeal reversing the sessions court and held as follows in her well written grounds of judgment ('judgment') reported in *Hong Leong Bank Bhd v Starfish Holdings Sdn Bhd & Anor* [2022] MLJU 3172; [2023] 2 CLJ 464 with emphasis added by us:

> [17] The learned SCJ's finding that the signatures on the disputed cheques were forgeries as such, is not without basis even though she did not say in her GOJ whether she gave due weight to SP2's evidence.
>
> [18] Under common law, a bank which pays out on a forged cheque drawn on its customer's account is liable to make good the loss. The common law was codified in s 24 of the Bills of Exchange Act 1949 ('the BEA') as follows:
>
> 24 Forged or unauthorised signature

A Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless
B the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

C [19] It is therefore no answer for the bank to press the argument that it was unaware of the forgery or that it took reasonable care by following its SOP. The bank has no mandate to pay on the disputed cheques and is liable for conversion, a strict liability tort — *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31. In *Tai Soon Heng*, the bank was held liable for
D honouring 97 forged cheques totaling some RM1.5m that were cleared over a period of three years. The bank argued that the customer was under a duty to ensure that its cheques were not forged by its employee and that it had acted in breach of this duty on the facts of the case. Following various cases in the Commonwealth, the Supreme Court held that there is no duty on the customer to take precautions in the general course of its business to prevent forgeries on the part of its servants. The
E Supreme Court held that a customer has a common law duty to the bank as follows:

(i) the customer has a duty of taking reasonable care in the drawing of cheques so as not to mislead the bank or facilitate forgery. This principle is recognised as the 'Macmillan duty'; and

F (ii) the customer has an implied duty to inform the bank if he discovers that cheques purporting to have been signed by him have been forged, referred to under common law as the 'Greenwood duty'.

[20] Liability under s 24 of the BEA is however not absolute as this provision itself is made 'subject to the provisions of this Act'. The BEA was amended by the Bills of
G Exchange (Amendment) Act 1998 which came into effect on 1 July 1998 by the insertion of s 73A *which reads:*

73A Knowingly or negligently facilitating forgery

Notwithstanding s 24, where a signature on a cheque is forged or placed thereon
H without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

I [21] Thus, s 24 of the BEA has now to be read in tandem with s 73A of the BEA. The legislative intention of s 73A was explained by the Court of Appeal in *Prima Nova Sdn Bhd v Affin Bank Bhd* [2014] MLJU 1926; [2014] 9 CLJ 442 (CA):

23 In our judgment, the effect of s 73A is to afford protection to a bank paying

'in good faith' in all cases in which there was negligence on the part of the drawer and which negligence afforded the opportunity for the forgery or fraud in circumstances that were the immediate cause of the payment by the banker ... *In other words, the effect of the amendment is that our courts should no longer determine the liability of a bank on a claim on forged cheques based on whether the customer observed the 'Macmillan' and 'Greenwood' duties approved by the Supreme Court in United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd but the wider duty of care considered but rejected by the Privy Council in Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors.*

[22] *By virtue of the amendment to the BEA, in other words, the customer and authorised signatory is required to ensure that they do not facilitate or make it easier for a person who is not the authorised signatory to commit forgery. A common example of such negligence envisaged, is where a non-signatory is given access to the cheque book.*

[23] In considering this issue, this court has borne in mind that the bank bears the burden of proving that:

(a) the signature on the cheques were forged;

(b) the person whose signature was allegedly forged knowingly or negligently contributed to the forgery; and

(c) it paid the cheque in good faith.

...

[32] In the instant case, the bank's learned counsel submitted that it has been proven by overwhelming evidence that SP1 on behalf of the plaintiff, had negligently contributed to the forgery or making of the unauthorised signature by entrusting the cheque books with the second defendant and failing to check the statements against the cheque buds. Just as in the *Panaron* case, the forgeries of the 37 disputed cheques took place over a prolonged period of more than three years and the bank's employees (SD1 to SD 8) had all acted in good faith and honestly. No evidence was adduced to prove otherwise.

[33] Clause 3(a) of the general terms and conditions of accounts provide:

3(a) The Customer(s) shall be responsible for keeping the cheque books under lock and key at all times. The Customer(s) shall inform HLB immediately in the event a cheque book or cheque leaf is missing, lost, stolen or destroyed. HLB will not be liable or responsible for any loss incurred by the Customer(s) if through his/her negligence or omission an unauthorised person obtains the cheque book or leaf and fraudulently obtains payment on any sum belonging to the Customer(s).

[34] The learned SCJ's finding that the plaintiff had taken preventive measures from fraud and forgery, by keeping the cheque books in a locked drawer is clearly indefensible, when in fact SP1 had as borne out by the evidence entrusted the plaintiff's cheque books with the second respondent in breach of cl 3(a) T&C ...

[35] *From perusing the evidence, it is clear or can irresistibly be inferred that the plaintiff and/or SP1 as a sole signatory of cheques had allowed the second defendant who is not an*

authorised signatory to have possession of the cheque book and when the forgery occurs, the plaintiff is negligent under the wider statutory duty of care under s 73A — Prima Nova. On the facts, the instant case is stronger than Prima Nova where the drawer where the cheque books were kept was locked but was forced open. Here, there is no evidence of any breaking in. The learned SCJ did not apply the law that the customer owes a duty to take care to ensure that the cheque book was not accessed by a non-signatory of the account and appears to have in para 22(f) of her GOJ completely ignored this failure of the plaintiff or SP1 keep the cheque books in their custody constitute negligence under the wider statutory duty of care under s 73A of the BEA. That makes her decision impeachable based on the decision in Prima Nova where the facts are not dissimilar to the present case.

[36] *The learned SCJ in para 22(g) of her GOJ found that the statements were forged by the second defendant but the plaintiff should not be blamed for such an unexpected occurrence. In so doing, the learned SCJ plainly overlooked that the plaintiff did not check the cheque butts against the bank statements and that had she done so she would have noticed that the cheque butts of the 37 transactions were not recorded in the forged statements. Not reconciling the monthly statements against the cheque butts is clearly unjustifiable ...*

[39] The learned SCJ appeared to have ignored the principles of law from cases decided by the Court of Appeal post introduction of s 73A and fell into grave error when she did not address her mind at all to the burning question of whether there was an adequate corporate governance on the plaintiff's part to stave off forgeries and fraud within its operations.

[40] *In this court's judgment, the learned SCJ was plainly wrong by completely overlooking the crucial evidence which show the bank had proven its case on the balance of probabilities as the plaintiff had failed to exercise due care to protect itself from the misconduct of its employee and that the plaintiff was in fact negligent by virtue of s 73A BEA and had undoubtedly facilitated, or afforded the opportunity and provided the means of making it easier for the second defendant to commit the forgeries of the signatures on the cheques. I am thus entitled to disturb the finding of the learned SCJ which found that the bank was liable.* With respect, I find that the learned SCJ fell into error in misapprehending the law and evidence in concluding that the plaintiff had successfully proved its case on a balance of probabilities against the bank.

[41] *In Public Bank Bhd v Anuar Hong & Ong* [2005] 4 MLJ 184; [2005] 1 CLJ 289, *where the customer failed to (i) verify its monthly current account statements; (ii) monitor its cheque books and keep them in a safe place; and (iii) supervise its accounts clerk, it was held that the customer was negligent as the bank cannot reasonably be required with their own legitimate commercial pressure and concerns to attend to, and be more vigilant in the customer's interest than the customer himself. Neither should the bank be expected to act as an amateur detective when the learned SCJ pronounced that the bank officers were not given proper training to detect forgery of signatures. In Public Bank Bhd & Anor v Exporaya Sdn Bhd* [2013] 1 MLJ 507 at 518; [2013] 2 CLJ 753*, the Court of Appeal referred to and applied the decision in the case of Lipkin Gorman (A Firm) v Karpnale Ltd* [1992] 4 All ER 331:

> *The contractual duties of a bank towards a customer were established by the English Court of Appeal in the case of Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All

ER 331 *where Alliott J held the following propositions:*

(1) *The bank is entitled to treat the customer's mandate at its face value save in extreme cases.*

(2) *The bank is not obliged to question any transaction which is in accordance with the mandate; unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention.*

(3) *It follows that if a bank does not have reasonable grounds for believing that there is fraud, it must pay.*

(4) *Mere suspicion or unease do not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate.*

(5) *A bank is not required to act as an amateur detective.*

[42] In *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 CLJ 1 at 13 where in following the decision in the case of *Lipkin Gorman (A Firm) v Karpnale Ltd* [1992] 4 All ER 331, the Federal Court held that a bank is supposed to treat the customer's mandate at its face value, save in extreme cases. A bank is not obliged to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that these was a misuse of authority for the purpose of committing a fraud.

[43] *The learned SCJ additionally, overlooked that sans any evidence of dishonesty, the bank is deemed to have acted in good faith under s 95 of the BEA which as alluded earlier, is a low threshold. Indeed, there is nothing to suggest otherwise than that the bank had acted in good faith. As per the bank's SOP, its officers are not required to contact the customer if a cheque encashed is less than RM5,000, or unless the signature on the cheques appear 'shaky' or not smooth.*

[44] *That is not all. The plaintiff owes a contractual duty to take steps to check its monthly bank statements and notify the bank of any discrepancies within 14 days of receipt of the monthly statements — cl 11 T&C. Breach of this obligation means the statements are deemed correct and the plaintiff is estopped from relying on the forgery of the second defendant.*

...

[46] I am however satisfied that the learned SCJ has clearly fallen into error in her insufficient appreciation of the evidence and misapprehending the law in concluding that the plaintiff had proven its case on a balance of probabilities against the bank. She also ought not to consider the several alleged breaches of the bank's duties that were not pleaded in making her findings. As such this court is entitled to disturb the findings of the learned SCJ.

[15] The appellant is dissatisfied with the judgment and has on 20 October 2022 lodged its appeal to the Court of Appeal.

A FINDINGS OF THIS COURT

[16] Before us, the appellant primarily advanced twelve grounds on why the learned judicial commissioner fell into error. Firstly, the appellant contended that the learned judicial commissioner erroneously found the appellant entrusted the chequebook to the second respondent. Secondly, the appellant contended that the learned judicial commissioner failed to consider the first respondent's employee failed to comply with the first respondent's standard operating procedures ('SOP') to report the cheque anomalies to the branch manager. Thirdly, the appellant contended the learned judicial commissioner failed to consider that the first respondent's SOP is flawed as it was not able to detect a jump in cheque serial numbers by bank tellers. Fourthly, the appellant also contended that the learned judicial commissioner failed to consider that the first respondent did not limit the number of cheque books that were issued to the customer. Fifthly, the appellant contended that the learned judicial commissioner failed to heed that the first respondent did not contact Teh Chee Yen of the appellant at all material times. Sixthly, the appellant contended that the learned judicial commissioner failed to consider that the first respondent did not recognise and take appropriate precautions that cash cheques have higher incidence of fraud. Seventhly, the appellant contended that the learned judicial commissioner failed to heed that the first respondent's employees were familiar with the second respondent. Eighthly, the appellant contended that the learned judicial commissioner failed to take into account that the first respondent's employees had insufficient time to examine the cheques. Ninthly, the appellant contended that the learned judicial commissioner failed to consider that the first respondent's specimen signatures obtained are inadequate to verify small counter-signatures. Tenthly, the appellant contended that the learned judicial commissioner failed to consider that there was no training provided by the first respondent to its employees on signature verification. Eleventhly, the appellant contended that the learned judicial commissioner ignored that the first respondent's officers testified that there were differences in cheque signatures. Finally, the appellant contended that the learned judicial commissioner failed to consider that the first respondent did not produce at trial its internal investigative report conducted on the forgeries committed.

[17] In opposition, the first respondent denied the appellant's contentions in that there were errors allegedly committed or overlooked by learned judicial commissioner. According to the first respondent, the learned judicial commissioner properly and adequately dealt with the application of ss 24 and 73A of the Bills of Exchange Act 1949 ('the BEA') on the facts of the case. As to the twelve grounds raised by the appellant before this court, the first respondent counter-contended that the learned judicial commissioner was mindful of them and held as follows in the judgment:

[48] I must mention that I have not dealt with every single argument advanced and case authority relied upon by the parties as I found it unnecessary nor am I aware of any legal requirement to do so in arriving at a decision. It is also to avoid a lengthy judgment.

The first respondent further contended that the learned judicial commissioner need not consider them as they were never pleaded by the appellant in its statement of claim.

[18] The law on appellate intervention of after-trial appeals have been best and oft-quoted dicta in the following dicta of Gopal Sri Ram JCA (later FCJ) in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 as follows:

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

...

In *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165; [1984] 1 LNS 40, the trial judge had arrived at a findings of facts based purely on the credibility of the witnesses he had seen and heard. The Court of Appeal of Singapore reversed his finding. On further appeal to the Privy Council the judgment of the Court of Appeal was upheld. Lord Roskill said (at p 168):

> Their Lordships do not find it surprising that the Court of Appeal not only felt obliged to reach the conclusion which they expressed orally at the conclusion of the hearing of the appeal that the learned judge's findings on the issue favourable to the appellant could not be supported, and that that court must reverse the learned judge's judgment and enter judgment for the respondents, but that in their written judgment they should have said that in basing his finding 'entirely on the credibility or otherwise of the witnesses testifying before him' the learned judge was guilty of 'a plain misdirection'. Their Lordships respectfully agree with the Court of Appeal that the findings favourable to the appellant were arrived at 'without an adequate scrutiny and consideration of all the evidence before him'.

Their Lordships are well aware, as no doubt were the Court of Appeal, of the limited circumstances in which it is open to an appellate court to reverse the findings of a trial

judge based on credibility of the witnesses who have given evidence at the trial. But when a trial judge has so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and, in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him, it is the plain duty of an appellate court to intervene and correct the error lest otherwise that error results in serious injustice.

In Armagas Ltd v Mundogas SA ('The Ocean Frost') [1985] 1 LIR 1, the English Court of Appeal reversed a finding of fraud made by the trial judge in that case on the ground that there had been no judicial appreciation of the evidence. Robert Goff LJ (later Lord Goff of Chieveley) said (at p 57):

> Furthermore, it is implicit in the statement of Lord MacMillan in *Powell v Streatham Manor Nursing Home* [1935] AC 243, at p 256 that the probabilities and possibilities of the case may be such as to impel an appellate Court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case. (Emphasis added.)

which has been referred and accepted by the Federal Court in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1.

[19] Furthermore, in *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; [2010] 6 CLJ 857 (FC), James Foong FCJ held as follows with emphasis added by us:

> [41] Before we leave this subject and move on to the next two questions, we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanor. *Thus, unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge. This 'plainly wrong' test has been long established and can be observed in the Judicial Committee of the Privy Council pronouncement in Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41; [1978] CLJU 32; [1978] 1 LNS 32 *where Lord Fraser said:*
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> > *In the face of that finding by the trial judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion, as the authorities already quoted show.*

[42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial judge.

[43] The first is Lord Tankerton in *Watt or Thomas v Thomas* [1947] AC 487:

(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court.

[44] The second is from Viscount Sankey LC in *Streatham Manor Nursing Home* [1935] AC 36, 36 who said:

> it is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it reseeing the court. There are different meanings to be attached to the word 'rehearing'. For example the rehearing at the Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appearing, the complainant starts again and has to make out his case and call his witnesses. *The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after trial before a judge alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there have been a conflict of evidence the Court of Appeal will have special regard to the fact that the trial judge saw the witnesses*: see Clarke v Edinburgh Tramways Co: per Lord Shaw, 1919 SC (HC) 35,36, where he says:
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> > When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to creditability or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the

> courts of justice in the ordinary case things are much more evenly divided; witness without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in their nuance, of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed pages. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: Am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[20] Consequently, in our appellate function of review only, we have scrutinised the judgment. It is not in dispute that the second respondent was in possession of the forged cheques that were tendered to the first respondent and encashed. We are accordingly satisfied that the crux of this appeal is the interplay of ss 24, 73A and 95 of the BEA particularly whether the appellant knowingly or negligently contributed to the forgery of the cheques by the second respondent who was not an authorised signatory of the cheques and whether the first respondent has acted in good faith in making payment on the cheques. These are mixed issues of fact and law.

[21] The relevant law is settled in that since the 1998 amendment by the insertion of s 73A which has to be read with s 95 of the BEA, the bank customer cannot merely rely on s 24 of the BEA to seek recompense from the bank even if forgery is established. In view of the decided cases post 1998, it is clear that if there is evidence that the bank customer knowingly or negligently contributes to the forgery or making of the unauthorised signature, the bank customer cannot claim against the bank pursuant to s 24 unless there is lack of good faith by the bank which constituted dishonestly.

[22] Thus, in respect of knowing or negligent contribution to the forgery, we find that the learned judicial commissioner has in reliance on the cases *Prima Nova Sdn Bhd v Affin Bank Bhd* [2014] MLJU 1926; [2014] 9 CLJ 442 (CA) as well as *Malaysia Plastics Sdn Bhd v United Overseas Bank (M) Bhd and another suit* [2012] 9 MLJ 336 and *CIMB Bank Bhd v Panaron Control Sdn Bhd* [2014] MLJU 1924; [2015] 1 CLJ 1056 correctly found that the appellant knowingly and negligently contributed to the forgery. In this regard, the learned judicial commissioner has in paras [35] to [39] of the judgment justified the same including the reasons whereby the sessions court judge erred.

[23] We are in agreement with the learned judicial commissioner that the

sessions court judge was plainly wrong for not having judicially appreciated the evidence when the undisputed evidence of the police report made by the first respondent that the second respondent has the cheque books in her possession as well as that the second respondent was entrusted the cheque books by the appellant since the cheque books were kept in a steel cabinet drawer which at all material times are untampered/unbroken were glaringly overlooked by the sessions court judge. Additionally, the sessions court judge merely found that the appellant checked the monthly bank statements without considering that the appellant ought to have checked them against the cheque butts which would have revealed the fraud of the second respondent.

[24] As to acting in good faith, we further find that the learned judicial commissioner has in reliance on the case of *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1 (FC) correctly found that the first respondent acted in good faith at all material times. The learned judicial commissioner again in paras [40] to [44] of the judgment justified the same and pointed to the flaws in the reasoning of the sessions court judge.

[25] In this regard, we are also in agreement with the learned judicial commissioner that the sessions court judge was plainly wrong in finding that the first respondent did not act in good faith because of failure to comply with the SOP but overlooked that the applicable SOPs are only to check specimen signature and call customer for verification if the sum exceeds the threshold of RM30,000 which were both complied by the first respondent. The impugned cheques here were all below the threshold amount. Moreover, the sessions court judge without evidence found that the first respondent was lackadaisical with their familiarity with the second respondent besides also failing to appreciate that lack of good faith necessarily connotes dishonesty on the part of the first respondent. Dishonesty by the first respondent has not been made out on the facts and circumstances whether by actual or circumstantial evidence. In actuality, we find that the appellant was instead lackadaisical over a period of three years in detecting the missing funds encashed by the second respondent but there was no egregious negligence by the first respondent.

[26] In the circumstances, we find that it was warranted of the learned judicial commissioner intervening to set aside the decision. In other words, we find no appealable error here.

[27] Finally, as to the other un-pleaded grounds now advanced by the appellant purportedly to further justify its allegation of lack of good faith of the part of the first respondent, we find and hold that we need not consider them. Nonetheless, we have, for completeness, reviewed them but find that the alleged grounds, do not constitute actionable breaches of contractual duty and/or impute bad faith upon the first respondent as described in the English

case of *Lipkin Gorman (a firm) v Karpnale Ltd and another* [1992] 4 All ER 331 approved in *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors*.

CONCLUSION

[28] It is for the foregoing reasons that we dismissed the appeal as so ordered.

Appeal dismissed.

Reported by Ashok Kumar